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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BRETT RONALD MATTESON, Defendant and Appellant.	F045045 (Super. Ct. No. F02676313-0) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Alan Simpson, Judge.

William Davies, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Vartabedian, Acting P.J., Harris, J., and Gomes, J.

INTRODUCTION

Appellant, Brett Ronald Matteson, was charged in an information with unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a), count one), receiving stolen property (Pen. Code, § 496d, subd. (a), count two), and unlawful alteration of vehicle identification (Veh. Code, § 10802, count three). On September 25, 2003, Matteson pled nolo contendere to count two and the remaining allegations were dismissed.[1] Matteson agreed to a three-year lid on his sentence.

The probation officer's report stated there were no unusual facts indicating probation could be granted if otherwise appropriate. The report set forth four aggravating factors: (1) the crime was carried out with planning, sophistication, and professionalism; (2) Matteson's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness; (3) Matteson's prior performance on probation or parole was unsatisfactory; and (4) Matteson served a prior prison term. The probation officer found there were no mitigating factors.[2]

The trial court found Matteson had a long criminal record and had prior prison commitments. The court noted all the factors which indicate the crime showed planning and sophistication. The court imposed the upper term of three years for count two, granted applicable custody credits, and imposed a restitution fine.

Matteson contends on appeal that the trial court violated his rights as set forth in *Blakely v. Washington* (2004) 542 U.S. 965 [124 S.Ct. 2531], and *Apprendi v. New*

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1 Matteson also admitted two misdemeanor allegations in another action.

2 According to the probation report, Matteson stole motorcycles, changed the parts, and had obtained, or attempted to obtain, new registration for the motorcycles from the Department of Motor Vehicles. One victim saw Matteson driving through the neighborhood with his motorcycle which the victim had reported as stolen. The California Highway Patrol impounded the motorcycle. Matteson presented paperwork showing the motorcycle was built from parts. The investigating officer determined the paperwork was fictitious and that true serial numbers on many of the parts had been filed off and new ones imprinted.

Jersey (2000) 530 U.S. 466. We will find that the trial court did not violate Matteson's constitutional rights in imposing the upper term for his conviction.

DISCUSSION

We reject Matteson's contention that the trial court's selection violates his constitutional rights because one of the factors used by the trial court to impose the upper term was the fact of Matteson's prior convictions. We also find that the principle of estoppel should be applied to his plea bargain.

A. Prior Convictions

Apprendi v. New Jersey, *supra*, 530 U.S. 466 held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 490.) *Blakely* held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose based solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." "In other words, the relevant 'statutory maximum' is not the maximum sentence the judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely, supra,* 524 U.S. at ___, [124 S.Ct. at pp. 2531, 2537].) Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact finding, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts.

The fact of a prior conviction, however, serves as an exception to the holding of *Apprendi*. This exception derives from *Almendarez-Torres v. United States* (1998) 523 U.S. 224 which found that the fact of the prior conviction was based on the defendant's recidivism, a traditional basis for a court to increase an offender's sentence. (*Id*. at p. 243.) Recidivism has not been viewed as an element to an offense but relates only to punishment. (*Id*. at p. 244.) The *Apprendi* case recognized that recidivism does not relate to the commission of the new offense. *Apprendi* also recognized that procedural safeguards attach to the fact of the prior conviction and that the defendant there did not

challenge the accuracy of the fact of his prior conviction. When this is so, due process and Sixth Amendment concerns are mitigated. (*Apprendi*, *supra*, 530 U.S. at p. 488.)

According to the probation report, Matteson had four prior felony convictions for burglary in 1991, evasion of a peace officer with willful disregard to life and property in 1993, grand theft in 1993, and receiving stolen property in 1997. Matteson did not object at sentencing to the accuracy of the probation report and did not challenge the fact of his prior convictions.

There were three remaining aggravating factors in the instant action in addition to the fact of Matteson's prior convictions. There were no mitigating factors noted in the probation report. Regardless of whether all of the aggravating factors the court utilized fell within the prior conviction exception, a single valid factor in aggravation is sufficient to expose the defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433). We therefore find *Blakely* inapplicable to the facts of the instant action.

B. Estoppel

Plea bargaining is a judicially and legislatively recognized procedure that provides reciprocal benefits to the People and the defendant. (*People v. Masloski* (2001) 25 Cal.4th 1212, 1216; *People v. Orin* (1975) 13 Cal.3d 937, 942; Pen. Code, § 1192.5.)

A defendant may be estopped from complaining about a sentence, even if it is unauthorized, if the defendant agreed to it as part of a plea agreement. (See *People v. Hester* (2000) 22 Cal.4th 290, 295.) When a defendant contends that the trial court's sentence violates rules that would have required the imposition of a more lenient sentence, but he or she avoided a potentially harsher sentence by entering into the plea bargain, the court will imply that the defendant waived any rights under such rules by choosing to accept the plea bargain. (*Ibid.*) "The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process." (*Ibid.*)

Matteson pled guilty to one offense and, in return, two felony counts were dismissed. The allegation in count three alleged that Matteson tampered with vehicle identification numbers. This was separate conduct from the taking of the motorcycle. Penal Code section 654 would not apply to this offense and Matteson faced a potential sentence on count three as well as count two. This was not Matteson's first criminal proceeding. He has four prior felony convictions as an adult. Matteson received the sentence for which he bargained. Under these circumstances, we find that Matteson's attempt to obtain a better bargain through the appellate process is trifling with the courts.[3]

DISPOSITION

The judgment is affirmed.

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[3] In light of our ruling, we do not reach the issue of whether the trial court's imposition of the upper term was harmless error in light of the remaining aggravating factors.